

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Richard Smuda,

Petitioner,

vs.

State of North Dakota,

Respondent.

**ORDER GRANTING MOTION TO
DISMISS AND ADOPTING REPORT
AND RECOMMENDATIONS**

Civil No. 3:10-cv-109

Petitioner Smuda filed a petition for habeas relief under 28 U.S.C. § 2254 (Doc. #3). The Court has received a Report and Recommendation from the Honorable Karen K. Klein, United States Magistrate Judge, recommending that:

- 1) Smuda's petition for habeas relief (Doc. #3) be **DISMISSED** with prejudice;
- 2) The Court certify that an appeal from the dismissal of this action may not be taken *in forma pauperis* because such an appeal is frivolous and cannot be taken in good faith; and
- 3) A certificate of appealability not be issued with respect to any of the issues raised by Smuda in this action.

Smuda has filed a Motion to Dismiss his petition for habeas relief, however, Smuda's motion is silent as to prejudice. Regardless, the Court has reviewed Magistrate Judge Klein's Report and Recommendation and agrees that Smuda's claims are time-barred. As such, the Court hereby adopts the Report and Recommendation in its entirety.

Based upon the entire record before the Court, dismissal of the motion is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings.

Therefore, a certificate of appealability will not be issued by this court. See Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997) (holding that a district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c)). If the petitioner desires further review of his petition, he may request the issuance of a certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with Tiedeman v. Benson, 122 F.3d 518, 25-52 (8th Cir. 1997).

Additionally, the Court finds that any appeal would be frivolous, could not be taken in good faith, and may not be taken *in forma pauperis*. See 28 U.S.C. § 1915(a)(3) (“An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.”); see also Coppedge v. United States, 360 U.S. 438, 444-45 (1962).

For the foregoing reasons, Sumda’s application requesting habeas relief is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 9th day of December, 2010.

/s/ Ralph R. Erickson
Ralph R. Erickson, Chief District Judge
United States District Court